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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1185

MEYER ZAUSNER SALES, INC.,
Petitioner,

v.

ORVILLE L. FREEMAN, Secretary of Agriculture of the United States,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: April 4, 1966

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IN THE

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MEYER ZAUSNER SALES, INC.,

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v.

ORVILLE L. FREEMAN, Secretary of Agriculture of the United States,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Meyer Zausner Sales, Inc. (hereinafter "Zausner"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this cause on March 8, 1966.

Opinions Below

The opinions of the Court of Appeals and the District Court are not yet officially reported. They are reproduced in the Appendix to this petition. (App. 1a, 9a.)

Jurisdiction

Jurisdiction to review by writ of certiorari the judgment of said Court of Appeals entered March 8, 1966, is invoked under the provision of 28 U.S.C. § 1254(1).

Question Presented

Has Congress, in Section 10(h) of the Agricultural Marketing Agreement Act, 7 U.S.C. § 610(h), expressly limited the subpoena power of the Secretary of Agriculture to persons subject to the provisions of said Act?

Statute Involved

Section 10(h) of the Agricultural Marketing Agreement Act, 7 U.S.C. § 610(h), provides in part:

> "For the efficient administration of the provisions of this chapter, the provisions, including penalties, of section 48, 49, and 50 of Title 15 [Sections 8, 9 and 10 of the Federal Trade Commission Act], are made applicable to the jurisdiction, powers, and duties of the Secretary in administering the provisions of this chapter, and to any person subject to the provisions of this chapter, whether or not a corporation. * * *"

Statement of the Case

Federal jurisdiction is based on 7 U.S.C. § 610(h), incorporating 15 U.S.C. § 49.

On August 30, 1965, the Department of Agriculture served on Brown Brothers Harriman and Company (hereinafter "Brown Brothers"), a banking corporation, a subpoena duces tecum calling for the production of all books and records relating to a specified account. This account is owned by Zausner. The Department of Agriculture purported to act pursuant to Section 10(h) of the Agricultural Marketing Agreement Act (hereinafter "the Act").

On August 31, 1965, Brown Brothers notified the Department of Agriculture that it would not produce the

records, on the ground that neither Brown Brothers nor Zausner was subject to the provisions of the Act and thus neither was subject to subpoena under Section 10(h).

On October 15, 1965, the Secretary of Agriculture (hereinafter the "Secretary") petitioned the United States District Court for the Southern District of New York to enforce the subpoena. Brown Brothers, by its own counsel, opposed the petition and Zausner obtained permission to argue and submit a brief in opposition to the petition but did not intervene as a formal party to the proceeding.

By decision filed February 3, 1966, the District Court granted the Secretary's petition (App. 9a), and on February 9, 1966 ordered compliance with the subpoena. (App. 7a.)

On February 16, 1966, Brown Brothers filed a notice of appeal (App. 5a) from the District Court's order. On March 8, 1966, the Court of Appeals affirmed the order of the Court below, and the judgment was entered on that date. (App. 1a, 3a.)

Thereafter, Brown Brothers advised Zausner that in view of its general relations with the United States Government, it did not desire to take any further steps to test the validity of the subpoena. On March 14, 1966, the Secretary moved for an immediate issuance of the mandate. On March 17, 1966, Zausner moved for an order granting it (i) the right to intervene for the purpose of seeking review by this Court and (ii) a stay pending final determination by this Court. On March 18, 1966, the Court of Appeals granted Zausner's motion. (App. 4a.)

REASONS FOR GRANTING THE WRIT

The case presents a question of first impression important to the administration of the Agricultural Marketing Act and related legislation which merits determination by this Court.

I. The Secretary of Agriculture Seeks a Radical Extension of His Powers Having Immediate and Far-Reaching Consequences.

For the first time since the passage of the Act thirty-three years ago, the Secretary in 1965 sought to enforce a subpoena against a person not subject to the provisions of the Act.* Now the Secretary seeks to enforce a number of such subpoenas. This case involves one. Another is subject of an appeal to the Third Circuit, the District Court of the Eastern District of Pennsylvania having granted enforcement. *Freeman* v. *Fidelity-Philadelphia Trust Co.*, 248 F. Supp. 487 (E.D.Pa. 1965). The Secretary also seeks to enforce subpoenas of this kind in the District Court of New Jersey. *Freeman* v. *Zausner Foods Corp.; Meyer Zausner, Inc.; Cleveland Sales Co.; Warrenville Milk Products Co.; Dairyland Milk and Cream Co.; and Major Smith, Inc.*, Civil No. 180-66, D.N.J.

We submit that Congress in Section 10(h) has limited the Secretary's subpoena powers to persons subject to the provisions of the Act. The Act regulates solely those persons, defined as handlers, who are engaged in the processing, producing and handling of agricultural commodities. 7 U.S.C. § 608c(1). In disregard of the plain language of Section 10(h), the Secretary seeks to subject

*Research has failed to disclose any prior judicial proceedings to enforce such a subpoena.

to his subpoena power every business and individual, whether or not regulated by the Act. This radical departure from prior practice constitutes an attempt to regulate indirectly, by means of the subpoena power, persons Congress has seen fit to exclude from the Secretary's regulation and scrutiny. Since Congress has not granted the Secretary the power to subpoena non-regulated persons, this Court should require the Secretary to remain within the confines of the authority conferred by Congress.

This case merits determination by this Court. The issue presented is one of first impression. It affects vast numbers of persons. The decision would settle the important question of the Secretary's subpoena powers in the administration of the Act and could have a similar effect under the Packers and Stockyards Act which contains virtually identical subpoena powers. 7 U.S.C. § 222. The issue is clearly defined since it is conceded that Zausner and Brown Brothers are not handlers and thus not subject to regulation under the Act. Two lower courts are presently considering the same question. The decision below is erroneous.

II. In Section 10(h), Congress Limited the Secretary's Subpoena Power to Persons Subject to the Act.

The Act was not designed to regulate all persons connected with agricultural products. Its basic purpose was limited to fixing minimum prices for the agricultural commodities included therein. *Stark* v. *Wickard,* 321 U.S. 228, 291 (1944); *Kass* v. *Brannan,* 196 F.2d 791, 795 (2d Cir.), *cert. denied,* 344 U.S. 891 (1952). The scope of the Act was further limited by the fact that the minimum prices which the Secretary was empowered to fix were only those prices which "handlers" pay for these commodities to other "handlers." Accordingly, the Secretary was given

the power to regulate only "handlers," a term specifically defined in the Act. 7 U.S.C. § 608c(1). Handlers are those who process, produce and handle milk and the Secretary may fix the minimum price at which they may buy or sell milk.

To achieve the purpose of fixing minimum prices, the Secretary can issue milk marketing orders requiring handlers to pay minimum prices for milk, 7 U.S.C. § 608c, and to investigate suspected violations of the milk marketing orders by handlers. 7 U.S.C. § 608a(7).

The subpoena sought to be enforced here was issued in connection with an investigation to determine whether certain handlers were violating provisions of a particular milk marketing order. (App. 30a.)

Clearly, under Section 8c, the Secretary has no power to issue any order except in the regulation of handlers. Thus, penalties for violation of orders issued under Section 8c are imposed upon handlers and their officers, directors, agents or employees. 7 U.S.C. § 608c(14). The government concedes that neither Zausner nor Brown Brothers is a "handler," or subject to regulation by the Secretary. (App. 11a.)

Section 10(h), from which the Secretary claims to derive his subpoena power, provides:

> "(h) For the efficient administration of the provisions of this chapter, the provisions, including penalties, of sections 48, 49, and 50 of Title 15, are made applicable to the jurisdiction, powers, and duties of the Secretary in administering the provisions of this chapter, *and to any person subject to the provisions of this chapter,* whether or not a corporation. * * *" (emphasis supplied)

The underscored language can only mean that the Secretary's subpoena power was limited to persons subject to regulation under the Act, in this case milk handlers.

The purpose and history of the Act demonstrate why Congress restricted the subpoena power in Section 10(h). The limited purpose of the Act was to enable the Secretary to regulate the minimum prices paid by handlers to other handlers for milk. Thus, broad subpoena powers were not necessary for the effective administration of the Act. All information concerning prices paid by or to handlers could readily be obtained from them. The Secretary's course of conduct over a period of thirty-two years is a powerful indication that effective enforcement of the Act is not dependent on the ability to enforce subpoenas against non-regulated persons. (See Arg 35a-37a) As this Court stated in *F.T.C.* v. *Bunte Bros.*, 312 U.S. 349, 352 (1941):

> "* * * Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred."

III. The Courts Below, by Misconstruing the Language and Purpose of Section 10(h), Granted Power to the Secretary Which Was Expressly Denied Him by Congress.

The Courts below held that the reference in Section 10(h) to Sections 8, 9 and 10 of the Federal Trade Commission Act confers upon the Secretary the full extent of the subpoena power of the Federal Trade Commission—i.e., to subpoena anyone as a witness whether or not they process, produce or handle milk. This conclusion ignores the qualifying clause "* * * and to any person subject to the provisions of this chapter, whether or not a corporation," language which can only mean that Congress limited

the subpoena power to those subject to regulation under the Act—i.e., handlers.*

The District Court held that this qualifying clause was inserted to extend the Secretary's power over persons as well as corporations since the Federal Trade Commission regulates primarily corporations, while the Act is concerned with persons and corporations. The District Court's decision in effect deleted the words *subject to the provisions of this chapter* and treated the clause as if it read "* * * and to any person, whether or not a corporation."

This treatment of the qualifying clause is clearly erroneous. First, the Federal Trade Commission has the broadest powers over persons as well as corporations. The District Court failed to cite Section 5, the heart of the Federal Trade Commission Act (App. 15a), which expressly covers the activities of "any person, partnership or corporation." Section 9 gives the Federal Trade Commission the power to subpoena persons as well as corporations, and Section 10 provides penalties for persons and corporations. There was no reason to make the Secretary's powers expressly applicable to persons, since the mere inclusion by reference of the Federal Trade Commission powers does precisely that.

Second, if Congress had wished to be redundant and expressly convey subpoena power over all individuals as well as corporations, it would obviously not have included the words *subject to the provisions of this chapter.*

---

* The District Court also sought to bolster its position on the ground that a comma preceded the qualifying clause. (App. 13a.) We submit the presence or absence of such a comma is meaningless. Section 10(h) as printed in the Congressional Record at the time it was debated does not contain such a comma. 77 *Cong. Rec.* 1486 (1933). Nor does the comma appear in an almost identical section of the Packers and Stockyards Act. 7 U.S.C. § 222.

In describing Section 10(h), the District Court, despite its ruling, could not avoid giving this clause its proper meaning:

> "The section incorporating the powers of the Federal Trade Commission into the Agricultural Act, therefore, expressly provides that the powers conferred upon the Secretary extend to individuals *who are regulated under the Agricultural Act* in addition to corporations." (App. 15a.) (Emphasis added.)

Unlike this Act, which regulates only minimum prices paid by and to handlers, the Act administered by the Federal Trade Commission is extremely broad and regulates all interstate business activity. As stated by this Court, the Federal Trade Commission "touches the greatest variety of unrelated activities" and the unfair competition regulated by the Commission covers "business practices which run the gamut from bribing employees of prospective customers to selling below cost for hindering competition." *F.T.C.* v. *Bunte Bros.*, 312 U.S. 349, 353-354 (1941). In view of the limited purpose of this Act, there was no need to give the Secretary the extensive subpoena powers granted to the Federal Trade Commission, and Congress specifically refused to do so. Neither the Secretary nor the courts can change the Act. See *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 395 (1956).

The District Court also rested its decision on the grounds that the result we urge would hamper the Secretary's performance of his duties (App. 15a) and that it would render superfluous Section 8(d), which gives the Secretary powers to inspect documents of handlers. (App. 14a.) For the first thirty-two years of the Act the Secretary did not find it necessary to attempt to enforce

a subpoena against non-regulated persons. Apparently, the limitations imposed by the language of Section 10(h) did not hamper the Secretary's enforcement of the Act. And, Section 8(d) only covers the production of documents, does not give the Secretary the power to obtain testimony from handlers and contains no enforcement provisions. Section 10(h) is necessary to give the Secretary the ability to require testimony and to force the production of documents from recalcitrant handlers.

The cases relied on by the District Court below and by the District Court for the Eastern District of Pennsylvania in the related case of *Freeman* v. *Fidelity-Philadelphia Trust Co.*, 248 F. Supp. 487, 492 (E.D. Pa. 1965), provide no support for the interpretation of Section 10(h) offered by those courts. Those cases setting forth the subpoena powers of the Federal Trade Commission are, of course, inapposite since a different statute is involved. The issue here is not the extent of those powers, but the extent to which they were conveyed to the Secretary of Agriculture. When Congress wishes to convey the subpoena powers of the Federal Trade Commission without limitation, it does so clearly and unmistakably. E.g., 29 U.S.C. § 521(b). Thus, cases involving other government agencies are inapplicable since the different statutes there involved have no bearing upon the power of the Secretary of Agriculture. The proposition for which these cases were cited by the District Court below—that the Federal Trade Commission power "extends to third parties who are neither under investigation nor being proceeded against" (App. 11a)—has no relevance to the issues raised by the instant case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel.

Dated: April 4, 1966

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APPENDIX

Opinion of the Court of Appeals

[R. 44] UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 347—September Term, 1965.

(Argued March 3, 1966 Decided March 8, 1966.)

Docket No. 30335

ORVILLE L. FREEMAN, Secretary of Agriculture of the United States,
Petitioner-Appellee,

v.

BROWN BROTHERS HARRIMAN AND COMPANY,
Respondent-Appellant.

Before:

LUMBARD, *Chief Judge,*
KAUFMAN, *Circuit Judge,* and FEINBERG, *District Judge.**

Appeal from the United States District Court for the Southern District of New York, Frederick vP. Bryan, *J.*, enforcing a subpoena issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act 7 U. S. C. §610.

Affirmed.

[R. 45] ALAN G. BLUMBERG, Assistant United States Attorney, New York, N. Y. (Robert Morgenthau, United States Attorney for the Southern District of New York and Arthur S. Olick, Assistant United States Attorney, New York, N. Y., on the brief), for *petitioner-appellee.*

* Sitting by designation.

Opinion of the Court of Appeals

ROBERT FISKE, JR., New York, N. Y. (Davis Polk Wardwell Sunderland & Kiendl, New York, N. Y., on the brief), *for respondent-appellant.*

PER CURIAM:

The question for decision is whether the Secretary of Agriculture has authority to subpoena, under Section 10(h) of the Agricultural Marketing Agreement Act, 7 U.S.C. § 610(h), witnesses who are not themselves subject to the regulatory provisions of that act. Brown Brothers Harriman and Company, a private banking company, appeals from an order of the District Court for the Southern District of New York enforcing an administrative subpoena duces tecum served on the bank for the records of a customer's account. The subpoena was issued in the course of an investigation into unlawful rebates allegedly paid by milk producers to handlers through brokers and sought the production of an account controlled by one Sol Zausner, a broker. The Secretary conceded for purposes of this proceeding that neither the bank nor Zausner was subject to the provisions of the act.

We agree with the district court that § 610(h) does authorize the Secretary to subpoena witnesses who are not subject to the provisions of the act and we reject the narrow [R. 46] interpretation of the statute urged by the appellants for the reasons stated in Judge Bryan's opinion, _____ F. Supp. _____ (Feb. 3, 1966) and by Judge Lord in *Freeman* v. *Fidelity-Philadelphia Trust Co.*, 248 F. Supp. 487, 491-92 (E.D. Pa., 1965).

The order of the district court enforcing the subpoena is affirmed.

Judgment of the Court of Appeals

[R. 47] UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit at the United States Courthouse in the City of New York, on the eighth day of March one thousand nine hundred and sixty-six.

Present: HON. J. EDWARD LUMBARD, Chief Judge,
HON. IRVING R. KAUFMAN, Circuit Judge,
HON. WILFRED FEINBERG, District Judge.

ORVILLE L. FREEMAN, Secretary of Agriculture of the United States,

Petitioner,

v.

BROWN BROTHERS HARRIMAN and COMPANY,

Respondent.

Appeal from the United States District Court for the Southern District of New York.

This cause came to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

Order Granting Intervention and Stay

[R. 72] UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighteenth day of March, one thousand nine hundred and sixty-six.

Present—Hon. J. EDWARD LUMBARD, Chief Judge,
Hon. IRVING R. KAUFMAN,
Hon. WILFRED FEINBERG,
Circuit Judges.

ORVILLE L. FREEMAN, Secretary of Agriculture of the United States,

Petitioner,

v.

BROWN BROTHERS HARRIMAN AND COMPANY,

Respondent.

Motions having been made herein by counsel for the appellee to issue the mandate forthwith and for other and further relief and by counsel for Meyer Zausner Sales, Inc. to intervene and to stay the issuance of the mandate pending a petition for a writ of certiorari to the Supreme Court of the United States,

Upon consideration thereof, it is

Ordered that said motion to intervene and to stay the issuance of the mandate be and it hereby is granted and that the issuance of the mandate be and it hereby is stayed pursuant to and subject to Rule 28(c) of the rules of this Court.

A. DANIEL FUSARO
Clerk

Notice of Appeal

[R. 124] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

M18-304

ORVILLE L. FREEMAN, Secretary of Agriculture of the United States,

Petitioner,

v.

BROWN BROTHERS HARRIMAN AND COMPANY,

Respondent.

Notice is hereby given that Brown Brothers Harriman and Company, respondent above named, appeals to the United States Court of Appeals for the Second Circuit from the final order in this proceeding entered February 11, 1966.

Dated: New York, New York
February 16, 1966

DAVIS POLK WARDWELL SUNDERLAND & KIENDL

By ROBERT B. FISKE, JR.
Partner

Attorneys for Respondent
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Notice of Appeal

To:

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For the Southern District of New York
Foley Square
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[R. 125] ROBERT M. MORGENTHAU, ESQ.
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FROMER, STEIN & BERKO
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New York, New York

Order of the District Court

[R. 121] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Petitioner having moved this Court for an order enforcing a subpoena served on Respondent on August 30, 1965 with respect to an account designated as Account 104, and the matter having come on for hearing before the Court on December 7, 1965 and petitioner having appeared by Robert M. Morgenthau, United States Attorney for the Southern District of New York (Alan G. Blumberg, Assistant United States Attorney, and Joseph Walsh, Attorney, Department of Agriculture, of Counsel), Respondent having appeared by Davis, Polk, Wardwell, Sunderland and Kiendl. (Thomas P. Griesa of Counsel) and the owner of Account 104 having appeared by Fromer, Stein & Berko (Martin Fromer of Counsel) and the Court after due deliberation having filed its opinion February 3, 1966 granting the Petitioner's motion.

NOW THEREFORE, on motion of Robert M. Morgenthau, United States Attorney for the Southern District of New York, it is hereby ordered and decreed:

1. That Petitioner's motion for enforcement of its subpoena duces tecum issued August 26, 1965 and served [R. 122] August 30, 1965 on Respondent Brown Brothers Harriman and Company shall be and hereby is granted, and

Order of the District Court

2. That Respondent Brown Brothers Harriman and Company is directed to appear on February 23, 1966 at 10:00 A.M. at the place designated in said subpoena and is directed to testify and to produce all the books, papers and documents called for by said subpoena.

Dated: New York, New York
February 9, 1966.

FREDERICK vP BRYAN
U. S. D. J.

Opinion of the District Court

[R. 92] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

APPEARANCES:

ROBERT M. MORGENTHAU, Esq.
United States Attorney for the Southern District of New York
Attorney for Petitioner

ALAN G. BLUMBERG, Esq.
Assistant United States Attorney
Of Counsel.

DAVIS, POLK, WARDWELL, SUNDERLAND & KIENDL, Esqs.
New York City
Attorneys for Respondent.

FROMER, STEIN & BERKO, Esqs.
New York City
Attorneys for Owner of Account 104, appearing with permission of the Court
MARTIN A. FROMER, Esq.
Of Counsel.

BRYAN, District Judge:

The Secretary of Agriculture moves to compel enforcement of a subpoena duces tecum against respondent banking corporation [R. 93] Brown Brothers Harriman and Company. Respondent opposes enforcement contending that the Secretary lacks authority to subpoena persons not

subject to regulation under the Agricultural Marketing Agreement Act (the Act) (7 U.S.C. § 601, et seq.). The respondent also maintains the subpoena is invalid because it was not signed personally by the Secretary. Respondent's customer Zausner, the records of whose account are the subject of the subpoena, was also heard in opposition to enforcement.

Under the Act, the Secretary has promulgated milk marketing orders which establish minimum prices that handlers of milk must pay to milk producers. (See 7 U.S.C. § 608c; 7 C.F.R. §§ 1002, 1004; see generally Fitchett Bros., Inc. v. Freeman, 241 F. Supp. 181 (S.D.N.Y. 1965). Having reason to believe that certain handlers were violating the pricing provisions of milk marketing orders, the Secretary instituted an investigation. The investigation was concerned primarily with payment of unlawful rebate charges by producers to handlers.

In the course of the investigation it appeared likely that several handlers have been purchasing milk from producers through "brokerage" firms controlled by one Sol Zausner. Some of the producers who delivered their milk to handlers through these "brokerage" firms apparently have paid "commission" fees [R. 94] into "Account 104" maintained at respondent's bank by Zausner.

Under the guise of such "brokerage commissions," the Secretary has reason to believe handlers are violating milk marketing orders by receiving unlawful rebates through the transfer of funds from this account to handlers. A subpoena duces tecum was served on respondent for records pertaining to "Account 104." Respondent's refusal to comply with the subpoena has resulted in this motion for enforcement pursuant to 7

U.S.C. § 610(h); 15 U.S.C. § 49. It is conceded by the Secretary for purposes of this motion, that neither respondent nor Zausner is subject to regulation under the Act.

Section 8a(7) of the Act (7 U.S.C. § 608a(7), gives the Secretary the power to "institute an investigation" whenever he "has reason to believe that any handler has violated * * * the provisions of any order * * *."

Section 10(h) (7 U.S.C. § 610(h) confers upon the Secretary broad powers to enforce the Act by incorporating into the Act statutory provisions in Title 15 of the United States Code governing the Federal Trade Commission.

> § 10(h). "For the efficient administration of the provisions of this chapter, the provisions, including penalties, of sections 48, 49, and 50 of Title 15, are made applicable to the [R. 95] jurisdiction, powers, and duties of the Secretary in administering the provisions of this chapter, and to any person subject to the provisions of this chapter, whether or not a corporation. * * *."

Section 49 of Title 15 confers upon the Federal Trade Commission the power to subpoena witnesses and documentary evidence relating to any matter under investigation.[1] This power extends to third parties who are neither under investigation nor being proceeded against. Federal

---

1 "For the purposes of sections 41-46 and 47-58 of this title the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation."

Trade Commission v. Tuttle, 244 F.2d 605 (2 Cir.), *cert. den.*, 354 U.S. 925 (1957); Federal Trade Commission v. Bowman, 248 F.2d 456 (7 Cir. 1957); see Federal Trade Commission v. Harrell, 313 F.2d 854 (7 Cir. 1963); Local 57, International Union of Operating Engineers v. Wirtz, 326 F.2d 467, 469-70 (1 Cir. 1964); *cf.* Federal Communications Commission v. Cohen, 154 F.Supp. 899, 906 (S.D.N.Y. 1957). The powers conferred upon the Federal Trade Commission and carried over into the Agriculture Act, therefore, are more than sufficient to permit the Secretary to subpoena the respondent. [R. 96]

Nevertheless, the respondent argues that the Secretary's powers are not as broad and inclusive as those of the Federal Trade Commission due to an alleged limitation placed upon the Secretary in Section 10(h), quoted above, incorporating § 49 of Title 15 into the Act. The clause in Section 10(h) "and to any person subject to the provisions of this chapter, whether or not a corporation," the respondent contends, is an express limitation on the Secretary's power of subpoena restricting it to persons subject to regulation under the Act. There is no merit to respondent's contention.

In construing a statute, a particular expression should not be detached from its content so as to give it a special meaning. See Richards v. United States, 369 U.S. 1, 11 (1962); Cummings v. Board of Education, 275 App. Div. 577, 90 N.Y.S.2d 564, 573 (1st Dep't.) *aff'd*, 300 N.Y. 611, 90 N.E.2d 67 (1949). Language should be construed according to its common meaning, without resorting to a forced or artificial construction. See Bracey v. Luray, 138 F.2d 8, 10 (4 Cir. 1943); U. S. Lines v. Shaughnessy, 101 F. Supp. 61, 64 (S.D.N.Y.), *aff'd*, 195 F.2d 385 (2 Cir. 1951).

With these elementary rules in mind, § 10(h), when read as a whole, makes it clear that the disputed clause expands the Secretary's powers rather then restricts them. Beginning the [R. 97] clause with the word "and," preceded by a comma, adds support to this interpretation.

Moreover, each section of a statute is to be interpreted in conjunction with other sections and in so far as possible, each section is to be harmonized with the others. Merkling v. Ford Motor Co., 251 App. Div. 89, 296 N.Y. Supp. 393, 399 (4th Dep't. 1937); See People v. Dethoff, 283 N.Y. 309, 315, 28 N.E.2d 850, 853 (1940).

Section 8d(1) of the Act (7 U.S.C. § 608d(1)), requires all persons subject to regulation under the Act to furnish the Secretary with such information, books and records as the Secretary finds necessary.[2] Where the requested

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2 § 608d. Books and records; disclosure of information.

"(1) All parties to any marketing agreement, and all handlers subject to an order, shall * * * upon the request of the Secretary, furnish him with such information as he finds to be necessary to enable him to ascertain and determine the extent to which such agreement or order has been carried out or has effectuated the declared policy of this chapter and with such information as he finds to be necessary to determine whether or not there has been any abuse of the privilege of exemptions from the antitrust laws * * *. For the purpose of ascertaining the correctness of any report made to the Secretary pursuant to this subsection, or for the purpose of obtaining the information required in any such report, where it has been requested and has not been furnished, the Secretary is authorized to examine such books, papers, records, copies of income-tax reports, accounts, correspondence, contracts, documents, or memoranda, as he deems relevant and which are within the control (1) of any such party to such marketing agreement, or any such handler, from whom such report was requested or (2) of any person having, either directly or indirectly, actual or legal control of or over such party or such handler or (3) of any subsidiary of any such party, handler, or person."

information has not [R. 98] been furnished, the Secretary is given the authority to examine all documents he deems relevant.

Under respondent's interpretation of § 10(h), it limits the Secretary to the powers Congress has already conferred upon him through §8d(1). Under this interpretation § 10(h) becomes a meaningless provision. Such an interpretation should be avoided. *Cf.* In re Smathers' Will, 309 N.Y. 487, 495, 131 N.E.2d 896, 900 (1956); People v. Dethoff, *supra,* 283 N.Y. at 315, 28 N.E.2d at 852.

Nevertheless, the respondent argues that its restrictive interpretation of § 10(h) is correct because § 10(h) provides the means for enforcing the powers enumerated in § 8d(1). This argument was raised and rejected in Federal Trade Commission v. Tuttle, *supra,* 244 F.2d at 614, which involved similar statutory provisions. The court stated:

> "Further, if the second half of the first sentence of Section 9 limits the subpoena power of the Commission to documents of the corporation under investigation, to which the Commission is given access and the right to make copies under the first half of the sentence, of what use is the grant of the power of subpoena? The Commission could get all the information it wanted from the corporation under the access and copying power. Respondent's construction of the language granting the subpoena power, would in effect render the subpoena power useless—an absurd result never contemplated by the Congress." [R. 99]

The legislative history is also contrary to the respondent's interpretation.

The legislative history shows that it was the clear intention of Congress to confer upon the Secretary the same powers granted the Federal Trade Commission rather than impose limitations upon him. See H. R. Conference Rep. No. 11 (73rd Cong., 1st Sess. 11 (1933); 77 Cong. Rec. 1986 (1933) (remarks of Senator Smith, Chairman of the Agriculture Committee and Senator Fess); H. R. No. 808, 74th Cong., 1st Sess., (1935) (Committee on Agriculture Report accompanying H. R. 7713.

A comparison of the functions of the Federal Trade Commission and the Department of Agriculture readily discloses the obvious reason for the language of the disputed clause.

The Federal Trade Commission regulates primarily corporate activity. See, e.g., 15 U.S.C. §§ 44, 46, 48, 49, 50. The Department of Agriculture, on the other hand, is concerned with persons as well as corporations dealing in agricultural commodities. See, e.g., 7 U.S.C. § 599(1); 7 C.F.R. § 1001.5. The section incorporating the powers of the Federal Trade Commission into the Agricultural Act, therefore, expressly provides that the powers conferred upon the Secretary extend to individuals who are regulated under the Agricultural Act in addition to corpo-
[R. 100] rations.

Absent a clear showing to the contrary, it is to be presumed that Congress intended to confer upon the Secretary adequate powers to enable him to perform his duties. *Cf.* Federal Trade Commission v. Tuttle, *supra,* 244 F.2d at 214-16. Without advancing a logical reason in light of the purposes of the Act, or citing any controlling authority, respondent has wholly failed to sustain an interpretation of the Act that would impair the Secretary in the performance of his duties.

I therefore reject the construction advanced by the respondent and hold that the Secretary may obtain information relating to a matter under investigation by a subpoena duces tecum served upon a person who is not subject to regulation under the Act. This is in accord with Judge Lord's recent opinion which passed upon the same issue. Freeman v. Fidelity-Philadelphia Trust Co., F. Supp. (E.D. Pa. Dec. 16, 1965).

The respondent raises one other point which is equally without merit. It argues that even assuming the Secretary has subpoena power under these circumstances, the subpoena is still invalid as the Secretary did not personally sign it.

To interpret the law as requiring the Secretary personally to sign all subpoenas is inconsistent with orderly and responsible [R. 101] administration and could well result in paralysis of various functions of the Department of Agriculture. *Cf.* Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 122-23 (1947); National Labor Relations Board v. John S. Barnes Corp., 178 F.2d 156 (7 Cir. 1949).

Nevertheless, the respondent contends that only the Secretary can sign a subpoena since the provisions governing the Federal Trade Commission incorporated into the Act appear to limit the signing of a subpoena to members of the Commission. (15 U.S.C. § 49.)

The subpoena presently before the court is signed by the Deputy Administrator of Regulatory Programs, Consumer and Marketing Service, Department of Agriculture. Even assuming the proposition that the Act required the Secretary personally to sign the subpoena, but see Freeman v. Fidelity-Philadelphia Trust Co., *supra,* it is clear that under subsequent legislation now in force the present

subpoena is validly issued under the authority of the Secretary of Agriculture lawfully delegated to the Deputy Administrator.

5 U.S.C. §§ 133z-133z-15 provides that whenever the President finds it necessary to authorize any officer to delegate any of his functions to accomplish the purposes of § 133z, he [R. 102] shall prepare a reorganization plan and submit it to Congress. Pursuant to these provisions, Reorganization Plan No. 2 of 1953 (67 Stat. 633, 18 Fed. Reg. 3219, Note, 5 U.S.C.A. § 511 (Supp. 1951-61)) vested all functions of the Department of Agriculture in the Secretary of Agriculture. The plan further provided that the Secretary may delegate any such function to any officer, agent or employee of the Department. (§ 4(a).) See Freeman v. Fidelity-Philadelphia Trust Co., *supra.* The authority to sign subpoenas was delegated as follows:

1. Delegation of powers from Secretary of Agriculture to Administrator of Agricultural Marketing Service, including any necessary redelegation of powers (29 Fed. Reg. 16212, December 3, 1964).

2. Delegation of powers from Administrator of Agriculture Marketing Service to the Deputy Administrator, Regulatory Programs (30 Fed. Reg. 1260, 1263, February 5, 1965).

3. Change of name from Agricultural Marketing Service to Consumer and Marketing Service (30 Fed. Reg. 2160, February 17, 1965, and 30 Fed. Reg. 6597, May 13, 1965).

Insofar as §4(b) of the Reorganization Plan is applicable, its provisions for notice and opportunity to be heard were fully met. [R. 103]

The Secretary's motion to compel enforcement of the subpoena duces tecum is granted.

Settle order on notice.

Dated: New York, N. Y.
February 3, 1966

FREDERICK VP. BRYAN
U. S. D. J.

Government's Order to Show Cause

[R. 1] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Upon the annexed verified application of Orville L. Freeman, Secretary of Agriculture of the United States, and exhibits attached thereto, and the annexed affidavit of Alan G. Blumberg, Assistant United States Attorney and sufficient cause appearing therefor, it is hereby

ORDERED that respondent, Brown Brothers Harriman and Company, New York, New York, show cause, if any there be, before this Court, in Room 506, United States Court House, Foley Square, New York, N. Y., on the 3rd day of November 1965 at 10:00 A.M., or as soon thereafter as counsel can be heard, why an order of this Court should not issue requiring said respondent to appear and give evidence before Orville Freeman, Secretary of Agriculture, United States Department of Agriculture, or an officer or representative designated by him, at such time and place as this Court may determine and there testify and produce the books, papers, records and documents specified in and required by a subpoena duces tecum of Clarence H. Girard, Deputy Administrator of Regulatory Programs, Consumer and Marketing Service, United [R. 2] States Department of Agriculture, a duly authorized representative of the Secretary of Agriculture, which subpoena was duly issued on the 26th day of August 1965, and served upon respondent on the 30th day of August 1965, in connection with an investigation being conducted by the Secretary of Agriculture pursuant to the provisions

of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq.;* and it is

FURTHER ORDERED that copies of this Order, and all papers on which it is based be served upon respondent on or before 5 PM the 15th day of October 1965 in the manner provided in the Federal Rules of Civil Procedure for the service of a summons.

Dated: New York, New York
October 14, 1965.

EDWARD L. PALMIERI
U. S. D. J.

Affidavit

[R. 3] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York
County of New York
Southern District of New York } ss.:

ALAN G. BLUMBERG, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York, and as such am in charge of and familiar with this matter.

2. As set forth more fully in the annexed application, the petitioner seeks an order directing respondent to comply with an administrative subpoena issued by the Department of Agriculture.

3. The reason why petitioner is moving by order to show cause rather than by notice of motion is that this is the customary and accepted practice in this Court for the enforcement of subpoenas.

[R. 4] 4. No previous application has been made for the relief requested.

ALAN G. BLUMBERG

Alan G. Blumberg
Assistant U. S. Attorney

Sworn to before me this
14 day of October, 1965.

[R. 5] IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

APPLICATION FOR AN ORDER REQUIRING RESPONDENT TO TESTIFY AND PRODUCE DOCUMENTARY EVIDENCE

To the United States District Court
For the Southern District of New York:

Orville L. Freeman, Secretary of Agriculture of the United States, by Robert M. Morgenthau, United States Attorney for the Southern District of New York, acting under the authority of the Agriculture Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601 *et seq.*, hereinafter referred to as the Act, respectfully applies to this Honorable Court for an order directing the Brown Brothers Harriman and Company, New York, New York, the respondent herein, to appear before Orville L. Freeman, Secretary of Agriculture of the United States, or such officers or representatives as he may designate, and there to testify and produce documentary evidence as required by a subpoena duces tecum issued on August 26, 1965, and served upon the respondent August 30, 1965, a copy of which is attached hereto and marked Exhibit "A", and as reasons therefor shows to the Court:

I

The petitioner, Orville L. Freeman, Secretary of Agriculture of the United States, hereinafter referred to as the Secretary, is authorized and directed under the Act to

issue orders, and amendments thereto, regulating the handling [R. 6] of milk in regional marketing areas. 7 U.S.C. §608c. In compliance with the Act, such orders issued by the Secretary contain provisions establishing the minimum prices which regulated handlers are required to pay for milk received from producers or associations of producers. 7 U.S.C. §608c(5). In the administration of the provisions of the Act and in order to determine whether any handlers of milk have violated, or are violating, the provisions of a milk marketing order issued by the Secretary pursuant to the Act, the Secretary is empowered, pursuant to section 8a(7) of the Act (7 U.S.C. §608a(7)), to institute an investigation. For the efficient administration of the provisions of the Act, the Secretary and his authorized agents are empowered by virtue of section 10(h) of the Act (7 U.S.C. §610(h)), which makes applicable to the jurisdiction, power and duties of the Secretary in administering the Act and the provisions of sections 8, 9 and 10 of the Federal Trade Commission Act (15 U.S.C. §§48, 49, 50), to require by subpoena the attendance and testimony of witnesses and the production of all documentary evidence "relating to any matter under investigation." 15 U.S.C. §49. And, in case of disobedience to a subpoena, the Secretary may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. 15 U.S.C. §49.

II

Jurisdiction to issue the order herein prayed for is conferred upon this Court by virtue of section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, (made applicable by section 10(h) of the Agricultural Marketing Agreement

Act, 7 U.S.C. §610(h)), which empowers any of the district courts of the United States within the jurisdiction of which an investigation is carried on, in case of contumacy or refusal [R. 7] to obey a subpoena, to issue an order requiring a corporation or other person to appear before the Secretary, or to produce documentary evidence, or to give evidence touching the matter in question.

III

The Secretary of Agriculture and his duly authorized representatives, having reason to believe that various regulated handlers have violated or are violating the terms and provisions of the federal milk marketing orders which regulate the handling of milk for the Delaware Valley and the New York-New Jersey marketing areas (7 CFR §§ 1002, 1004), have instituted an investigation pursuant to section 8a(7) of the Act, 7 U.S.C. § 608a(7). Such investigation relates primarily to the question of whether the basic minimum pricing provisions of the marketing orders have been violated or are being violated by reason of unlawful rebates, refunds, kickbacks, or other unlawful actions resulting in nonpayment to producers and cooperative associations of producers of the minimum prices required to be paid for milk pursuant to the marketing orders.

IV

It has been discovered in the course of said investigation, *inter alia,* that several handlers regulated under the Delaware Valley milk marketing order, including Rainiers

Dairies, Inc., Abbotts Dairies, Millside Dairy, Quakermaid Dairy and Sunny Ayr Farms, have purchased and are purchasing milk from cooperative associations of producers allegedly through one or more of the several "brokerage" firms which are owned or controlled by one Sol Zausner; that some of the cooperative associations which deliver milk to the regulated handlers, allegedly through such "brokerage" firms, have made deposits, directly or indirectly, into a bank account [R. 8] designated "Account 104" maintained with the respondent banking corporation, of substantial sums of money in excess of normal brokerage fees; that said "Account 104" appears to be owned or controlled by said Sol Zausner; and that, under the guise of such "brokerage" commissions, the handlers involved may be receiving substantial rebates, refunds, or kickbacks directly or indirectly by transfer of funds from "Account 104" to said handlers, their officers, employees, directors or stockholders, or to other bank accounts owned or controlled by said persons. The investigation has also indicated similar irregularities involving "Account 104" with regard to handlers subject to regulation under the New York-New Jersey milk marketing order.

V

The respondent is a private banking corporation, having its principal place of business at 59 Wall Street, New York, New York, within the jurisdiction of this Court. "Account 104", referred to in paragraph IV hereof, is maintained with the respondent in its capacity as a banking corporation.

VI

On August 26, 1965, a subpoena duces tecum was issued and signed by Clarence H. Girard, Deputy Administrator for Regulatory Programs, Consumer and Marketing Service, United States Department of Agriculture, a duly authorized representative of the Secretary of Agriculture, requiring the respondent, Brown Brothers Harriman and Company, to appear before Frederick W. Ebner, Jr., or Rodney L. Flam, duly authorized representatives of the Secretary of Agriculture, on the 1st day of September 1965, at 10:30 a.m. of that day, at respondent's place of business, to testify, and to produce at said time and place, and for a reasonable time thereafter, [R. 9] specified documentary evidence pertaining to the account designated as "Account 104." Said subpoena duces tecum was served upon the respondent on August 30, 1965, through an officer of the respondent corporation, at its offices at 59 Wall Street, New York, New York. By letter dated August 31, 1965, the respondent declined, at the direction of its customer, to testify or produce documentary evidence, as required by the subpoena duces tecum, until there has been a judicial determination of its validity. A true and correct copy of said letter is attached hereto and made part hereof as Exhibit "B".

VII

Petitioner is informed and believes and therefore alleges that at all times herein stated the documentary evidence described in the said subpoena duces tecum was and is now in the custody and control of the respondent at its offices in New York, New York.

VIII

All the books, records, papers, or like documents referred to in the said subpoena duces tecum and required to be produced by such subpoena were at the time of the issuance of such subpoena, and are now, relevant, material and appropriate to the investigations being conducted under the Act, specifically to determine whether the minimum pricing provisions of the milk marketing orders have been or are being violated.

IX

The refusal of the respondent to produce the documentary evidence required by the said subpoena duces tecum impeded and continues to impede said investigation.

X

No previous application has been made for the documentary [R. 10] evidence herein demanded.

XI

WHEREFORE, petitioner respectfully prays:

(a) That the Court issue an order directing respondent to appear before the said Secretary or such officers or representatives as he may designate, at such time and place as this Court may order, and there to testify and produce the documentary evidence designated, as required by the said subpoena duces tecum; and

(b) That, pending issuance of the aforesaid order, the Court issue forthwith an order directing respondent to appear before this Court upon a day certain and show cause, if any there be, why an order should not issue requiring respondent to appear before the said Secretary or his authorized representatives at such time and place as this Court may order, and there to testify and produce the designated documentary evidence, as required by the said subpoena duces tecum; and

(c) That petitioner have such other and further relief as may be necessary or appropriate.

Robert M. Morgenthau
United States Attorney
Attorney for Petitioner

By: ALAN G. BLUMBERG

Alan G. Blumberg
Assistant U. S. Attorney
Office & Post Office Address:
United States Court House
Foley Square
New York, New York 10007
Tel: 264-6328

[R. 11] IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

District of Columbia: ss

Herbert L. Forest, being duly sworn, deposes and says that he is the Director of the Dairy Division, of the Consumer and Marketing Service, United States Department of Agriculture, and as such has the responsibility and authority to supervise the administration and enforcement, for the Department of Agriculture, of all milk marketing orders issued under the authority of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*); that he has read the foregoing application and knows the contents thereof; that the same is true to the best of his information and belief; and that the sources of deponent's information and the grounds of his belief are official records of the Department of Agriculture, as well as personal knowledge that the investigation therein referred to has been instituted and is presently being conducted by the Department.

HERBERT L. FOREST

Sworn to before me this
12th day of Oct. 1965.

EVELYN R. WARFIELD
Notary Public
My commission expires 3/31/70.

Exhibit A

[R. 12] SUBPOENA DUCES TECUM
UNITED STATES OF AMERICA

UNITED STATES DEPARTMENT OF AGRICULTURE

To: Brown Brothers Harriman and Co.
Private Bankers
59 Wall Street
New York, New York

You are hereby required to appear before Frederick W. Ebner, Jr. or Rodney L. Flam authorized representatives of the Secretary of Agriculture of the United States at your place of business in the city of New York, New York on the 1st day of September, 1965, at 10:30 A.M., local time, of that day, to testify in connection with an investigation being conducted under section 8a(7) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*, 608a(7)), to determine whether milk handlers subject to regulation under the Federal Milk Marketing Orders (7 CPR Parts 1004, 1002), as amended, regulating the handling of milk for the Delaware Valley and the New York-New Jersey Marketing Areas have violated, or are violating, any of the terms and provisions of said marketing orders.

And you are hereby required to bring with you and produce at said time and place, and for a reasonable time thereafter, the following books, papers, and documents or true copies thereof: [R. 13]

All bank statements, canceled checks, deposit slips and other records pertaining to the account designated as the "Account 104" or similar identification, including but not limited to all signature cards,

Exhibit A

identifying persons (natural, corporate or other) entitled to draw on such account, from the opening of said account to the date of your appearance as aforesaid.

The foregoing requirements are essential to such investigation under section 8a(7) of the aforesaid Agricultural Marketing Agreement Act of 1937, as amended, and there is reason to believe that the testimony and the books and records required of you, pursuant to this subpoena, are relevant to such investigation.

This subpoena is issued pursuant to authority contained in section 9 of the Federal Trade Commission Act (15 U.S.C. 49), which provision, by virtue of section 10(h) of the aforesaid Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 610(h)), are made applicable to the jurisdiction, powers, and duties of the Secretary of Agriculture in administering the provisions of the said Agricultural Marketing Agreement Act.

FAIL NOT AT YOUR PERIL.

Done at Washington, D. C.
this 26th day of August, 1965
pursuant to delegation of authority
from the Secretary of Agriculture.

CLARENCE H. GIRARD
Deputy Administrator
Regulatory Program
Consumer and Marketing Service
U. S. Department of Agriculture
Washington, D. C.

Exhibit A

[R. 14] RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served (a) in person * * * on the person named here on the 30 day of August, 1965.

I certify that the person named herein was not in attendance as a witness as required herein at—Refusal was expressed in letter to the Market Administrator on

(Issuing Officer)

Exhibit B

[R. 15] [LETTERHEAD OF]

BROWN BROTHERS HARRIMAN & CO.

August 31, 1965

Mr. Arthur L. Casey
United States Department of Agriculture
1528 Walnut Street
Philadelphia, Pennsylvania 19102

Dear Mr. Casey:

This will acknowledge receipt of the subpoena duces tecum served on us on August 30, 1965 requesting the production of the documents described therein on September 1, 1965 at 10:30 A.M.

As we have previously informed the Department of Agriculture, our customer to whom the subpoenaed documents relate has advised us that the subpoena is invalid by reason of the fact that neither Brown Brothers Harriman & Co. nor the customer is a handler subject to regulation by the Department of Agriculture and neither one is a person "subject to the provisions of (Chapter 26)" as required by Section 10 (h) of the Act pursuant to which the subpoena was served. 7 U.S.C. 610 (h). As we have previously informed you, our customer has directed us not to produce the documents requested and therefore we respectfully advise you that we cannot comply with this subpoena until there has been a judicial determination of its validity.

We understand that you have been in communication with our attorneys, Davis Polk Wardwell Sunderland &

Exhibit B

Kiendl, in connection with this matter and have advised them that you will institute civil proceedings to enforce this subpoena. We and our attorneys will be glad to cooperate with you in every way necessary to assure a prompt determination of the legal questions involved, and in this connection we request that you contact Thomas P. Griesa, Esq. of the firm of Davis Polk Wardwell Sunderland & Kiendl in connection with the further proceedings in this matter.

Faithfully yours,

per pro BROWN BROTHERS HARRIMAN & Co.
P B Bartlett

PBB:ci
cc: Clarence H. Girard
Washington, D. C.

Affidavit of Sol Zausner

[R. 20] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New Jersey }
County of Union } ss.:

SOL ZAUSNER, being duly sworn, says:

1. I submit this affidavit in opposition to petitioner's application for an order enforcing a subpoena duces tecum issued by the Department of Agriculture and served on respondent August 30, 1965. A copy of the subpoena is attached as Exhibit A to petitioner's affidavit. The subpoena seeks the production of all records of respondent pertaining to a certain "Account 104" maintained with respondent.

2. The company which maintains the Account with respondent, of which I am President, is a subsidiary of the Zausner Foods Corporation. Neither this company nor the Zausner Foods Corporation is a "handler" or a "producer" within the purview of the Agricultural Adjustment Act. Neither company has ever filed, or been required to file the reports of receipts and utilization required to be filed by companies subject to regulation under the Agricultural Marketing Act [R. 21] (7 C.F.R. §§1004.30-31). These companies have been in business for many years and the Department of Agriculture has been aware of their existence, but no request has ever been made that either company file such reports inasmuch as the Department of Agriculture does not consider them

to be "handlers" under the Act or the Federal Milk Marketing Order in question. Section 608c(5)(A) provides for milk marketing orders to be issued classifying milk and fixing minimum prices for each use classification "which all handlers shall pay". The subpoena specifically refers to Federal Milk Marketing Orders regulating the handling of milk for Delaware Valley and the New York-New Jersey Marketing Areas. The said orders specifically define what is meant by the term "handler". Your deponent's firms are not handlers under the said definitions, and the Secretary of Agriculture will not deny this fact.

3. The Agricultural Adjustment Act (Section 608d(1)) provides that all parties to any marketing agreement, and all handlers subject to an order, shall, upon the request of the Secretary, furnish him with such information as he finds to be necessary to enable him to ascertain and determine the extent to which such agreement or order has been carried out. The said section provides for the information to be furnished in accordance with forms of reports to be prescribed by the Secretary. No such reports have been required of your deponent's companies. The said section also authorizes the Secretary to examine the books and records of parties to marketing agreements and of handlers. The books [R. 22] of your deponent's companies have not been examined or sought to be examined under the provisions of this section of the Act inasmuch as deponent's companies are neither parties to a marketing agreement nor handlers under the orders in question. The Secretary is in a position to verify whether producers have been paid for milk at the prescribed minimum class prices by examining the books and records of the handlers who purchased the milk in question.

4. From the foregoing, it is apparent that neither the company which maintains Account 104 nor respondent, Brown Brothers Harriman and Company, is a company subject to the provisions of the Agricultural Adjustment Act. Inasmuch as § 610(h) of the Agricultural Adjustment Act limits the subpoena power of the Secretary of Agriculture to "any person subject to the provisions of (the act)", it is clear there is no valid basis for the issuance, or the enforcement, of the subpoena here in question.

5. It is respectfully submitted that petitioner's application for enforcement of the subpoena should be denied and the subpoena should be vacated in all respects.

/s/ SOL ZAUSNER

Sworn to before me this
5th day of November, 1965.

FRANKLIN P. BUSHNELL
Notary Public

BLANK PAGE

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1185

MEYER ZAUSNER SALES, INC., PETITIONER

v.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The Secretary of Agriculture, pursuant to Section 8a(7) of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 608a(7), instituted an investigation to determine whether certain federal milk marketing orders had been or were being violated by means of unlawful rebates, refunds, kickbacks, etc., resulting in nonpayment to dairy producers of the minimum prices required by the orders (Pet. App. 24a). On August 26, 1965, the Secretary issued a subpoena *duces tecum* under Section 10(h) of the Act, 7 U.S.C. 610(h), to Brown Brothers Harriman and Company (a private banking corporation in New York City), seeking the production of the bank's

records pertaining to an account maintained by petitioner (Pet. 2; Pet. App. 30a–31a), one of several "brokerage" corporations owned by Sol Zausner (Pet. 2; Pet. App. 25a). According to information obtained during the investigation, a number of dairy companies ("handlers") subject to milk marketing orders had been purchasing milk from cooperative associations of dairy producers through one or more of the Zausner corporations, and the cooperatives had been depositing substantial sums of money, in excess of normal brokerage commissions, in petitioner's bank account (Pet. App. 24a–25a). The subpoena was issued to enable the Secretary to determine what disposition petitioner had made of these deposits—specifically, whether, in the guise of brokerage commissions paid to petitioner by the cooperatives, the handlers were actually receiving unlawful rebates from the cooperatives (Pet. App. 25a).

Upon the refusal of the bank to comply with the subpoena, this action for enforcement was brought. In the district court, the bank contended, among other things, that the Secretary was authorized to subpoena the records only of persons or corporations subject to direct regulation under the Agricultural Marketing Agreement Act—which the bank, of course, is not. The district court rejected this contention and ordered compliance with the subpoena. The court of appeals affirmed, expressing its agreement with the reasoning of the district court in this case and the district court in *Freeman* v. *Fidelity-Philadelphia Trust Co.*, 248 F. Supp. 487 (E.D. Pa.), appeal pending, C.A. 3, No.

15,822.[1] Following the decision of the court of appeals, the bank indicated that it did not intend to resist the enforcement of the subpoena further. Petitioner then sought and was granted by the court of appeals leave to intervene.

Petitioner questions neither the Secretary's authority to conduct an investigation to determine whether federal milk marketing orders have been violated by means of rebates, nor the relevance of the records sought from Brown Brothers Harriman to the present such investigation—for obviously the disposition made by petitioner of the sums deposited in its account by the cooperatives bears on whether that account is serving as a conduit for the payment of rebates by the cooperatives' members to the handlers. The only question is thus whether the Secretary may subpoena the bank records of a corporation (or person) which, like Brown Brothers Harriman, is not itself directly subject to regulation under the Agricultural Marketing Act. We submit he clearly may.

7 U.S.C. 610(h) provides:

> For the efficient administration of the provisions of this chapter, the provisions, including penalties, of sections 48, 49, and 50 of Title 15, are made applicable to the jurisdiction, powers, and duties of the Secretary in administering the provisions of this chapter, and to any person subject to the provisions of this chapter, whether or not a corporation. * * *

[1] In *Fidelity-Philadelphia*—where the district court considered and rejected the precise contention made by petitioner in this case—the Court of Appeals for the Third Circuit on April 14, 1966, denied Fidelity-Philadelphia's motion for a stay pending appeal from the district court's enforcement order.

In other words, the Secretary of Agriculture has the same subpoena powers enjoyed by the Federal Trade Commission under 15 U.S.C. 49;[2] and it is well-settled—as petitioner apparently concedes (Pet. 9–10)—that the Trade Commission may by subpoena reach records in the possession of persons not themselves subject to its regulatory authority. See, *e.g.*, *Federal Trade Commission* v. *Tuttle*, 244 F. 2d 605 (C.A. 2), certiorari denied, 354 U.S. 925; *Federal Trade Commission* v. *Bowman*, 248 F. 2d 456 (C.A. 7). The broad investigatory powers that Congress meant to vest in the Commission—and in the Secretary—would be largely ineffective otherwise.[3] In addition, as the

[2] The legislative history of 7 U.S.C. 610(h) confirms that Congress intended to incorporate the Federal Trade Commission's subpoena power into that section without limitation. The Conference Report on Section 10 of the Agricultural Adjustment Act of 1933, 48 Stat. 37, where the provision in question first appeared, pointed out that it

> * * * makes applicable in the administration of this title the provisions of sections 8, 9, and 10 of the Federal Trade Commission Act. These sections provide for the furnishing of records, papers, and information by the departments and bureaus of the Government, *for requiring the attendance and testimony of witnesses and the production of documentary evidence*, and for the taking of depositions. * * * [Emphasis added.]

H. Rep. No. 100, 73d Cong., 1st Sess., p. 11. See, also, 77 Cong. Rec. 1486–1487. In 1935, in a report on certain proposed amendments to the 1933 Act, the House Agriculture Committee stated (H. Rep. No. 808, 74th Cong., 1st Sess., p. 7):

> By the force of Section 10(h) the Secretary can, in connection with such investigation and hearing, *exercise the same powers subject to the same limitations* as in the case of similar proceedings before the Federal Trade Commission. * * * [Emphasis added.]

[3] Petitioner argues that the Secretary does not need the Federal Trade Commission's "extensive" subpoena powers (Pet. 9).

district court pointed out (Pet. App. 13a–14a), the grant of subpoena power in 7 U.S.C. 610(h) would be wholly superfluous if its application were limited to persons or corporations subject to direct regulation, since 7 U.S.C. 608d(1) gives the Secretary all necessary authority to examine the books and records of such persons.[4]

Petitioner relies on the language of 7 U.S.C. 610(h) making the subpoena powers of the Trade Commission applicable "to any person subject to the provisions of this chapter, whether or not a corporation." (See p. 3, *supra*.) But it is obvious from the context and background that this phase was intended, not to place limitations upon the Secretary's subpoena power not applicable to the Federal Trade Commission, but merely to make clear that the Secretary's jurisdiction, powers, and duties extend to persons as well as corporations in those instances where 15 U.S.C. 48–50 con-

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On the contrary, this very investigation clearly shows the administrative need for such subpoena powers. Examining the bank account records will put the Secretary in a far better position to determine without excessive delay the true nature of the sums paid into and withdrawn from petitioner's account than if he were required to inspect the financial records of the handlers and cooperatives potentially involved here.

[4] Petitioner contends that Section 610(h) enables the Secretary to enforce Section 608d(1) by subpoena (Pet. 10). But that would be a cumbersome procedure, requiring the Secretary to institute a formal investigation pursuant to 7 U.S.C. 608a(7), whereas under 15 U.S.C. 49 (incorporated into Section 610(h); see pp. 3–4, *supra*), the Secretary may enforce Section 608d(1) far more expeditiously by mandamus proceedings in federal district courts.

fer authority upon the Federal Trade Commission only with respect to corporations.[5]

The decision below is clearly correct, and further review is not warranted. The petition for certiorari should therefore be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

APRIL 1966.

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[5] 15 U.S.C. 48 requires government agencies, upon Presidential direction, to furnish the Commission upon its request with all records, papers, and information in their possession pertaining to any *corporation* subject to the Federal Trade Commission Act. 15 U.S.C. 49 provides that for purposes of that Act the Commission is given access to for the purpose of examination, and the right to copy, any documentary evidence of any *corporation* being investigated or proceeded against. And 15 U.S.C. 50 penalizes any person who falsifies the records of a *corporation* subject to the Federal Trade Commission Act, and fines *corporations* that wrongfully fail to file required reports.

U.S. GOVERNMENT PRINTING OFFICE: 1966